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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-511

LO-JI SALES, INC.,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

MOTION OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC. AND THE FREEDOM TO READ FOUNDATION FOR LEAVE TO FILE A BRIEF, AS *AMICI CURIAE*, IN SUPPORT OF THE PETITIONER AND BRIEF ATTACHED

MICHAEL A. BAMBERGER
Attorney for Amici
425 Park Avenue
New York, New York 10022

FINLEY, KUMBLE, WAGNER,
HEINE & UNDERBERG
Of Counsel

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Statement

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., the National Association of College Stores, Inc., and The Freedom to Read Foundation (collectively referred to as *Amici*) hereby respectfully

move for leave pursuant to Rule 42 of the Rules of the Supreme Court of the United States to file the attached brief *amici curiae* in this case. The consent of the attorney for petitioner has been obtained and filed with the Court. The consent of the attorney for respondent was requested but refused.

The *Amici*

Amici's members publish, produce, distribute, sell and lend books, magazines and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is a trade association organized under the laws of the State of New York. It is the major national association of booksellers in the United States. ABA has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is a trade association organized under the laws of the State of New York. It is a major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately three hundred and twenty-five members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of all general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

The Council for Periodical Distributors Associations is an Illinois not-for-profit corporation. It is the national trade association for over five hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is a trade association organized under the laws of the State of New York. It is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,300 college stores located throughout the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

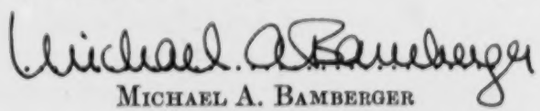
Interest of the *Amici*

The interest of *Amici* reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on obscene ma-

terials not protected by the First Amendment. Although this case concerns admittedly obscene materials, the *Amici's* brief will indicate the impact of the legal principles involved upon those who publish, produce, distribute, sell and lend material which is not obscene. *Amici* have learned from experience that, at the local level, the sophistication required to make the classifications and distinctions necessitated by *Miller* v. *California*, 413 U.S. 15 (1973), is often absent, and that consequently legitimate constitutionally-protected books and periodicals are frequently treated identically with those materials which are obscene and not protected. Unless seizures justified by cursory examinations and massive seizures constituting prior restraints continue to be barred by this Court, a breach will have been created in the constitutionally mandated wall of the First Amendment.

In view of the foregoing, *Amici* seek leave to file the attached brief.

Respectfully submitted,



MICHAEL A. BAMBERGER
Attorney for *Amici Curiae*
425 Park Avenue
New York, New York 10022

FINLEY, KUMBLE, WAGNER,
HEINE & UNDERBERG
Of Counsel

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BRIEF ON BEHALF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., AND THE FREEDOM TO READ FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., the National Association of College Stores, Inc. and The Freedom to Read Foundation (collectively referred to as *Amici*) submit this joint brief, *amici curiae*, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of the petitioner, Lo-Ji Sales, Inc., having submitted a motion for permission to file same.

Interest of the *Amici*

This case presents two questions which are of particular concern to *Amici*—whether the total seizure prior to an adversary hearing of over 860 copies of approximately 650 items, constituting all copies of the films, books and magazines determined by a magistrate *ex parte* to be possibly obscene, violates the First, Fourth and Fourteenth Amendments to the United States Constitution, and whether, in determining the question of whether there is probable cause to seize material from a book store on the ground of obscenity, the finder of fact must "focus searchingly" upon the alleged obscene materials taken as a whole, or whether a casual review of selected portions of the materials is sufficient.

Amici are concerned that the affirmance of the decision of the Court below, which represents a regression to the discredited standard of *Regina* v. *Hicklin*, [1868] L.R. 3 Q.B. 360, would be a radical departure from traditional First Amendment protections supported by this Court, and would represent a significant step backwards in the protection of legitimate First Amendment protected material by giving a magistrate the ability to order and effect the seizure of potentially protected First Amendment material without a searching focus on the material as a whole and further permitting massive seizures in violation of the prior learning of this Court, without the requisite prior adversary hearing.

POINT I

The seizure prior to an adversary hearing of over 860 copies of approximately 650 items, which constituted all the copies of such items held by petitioner, was constitutionally impermissible.

Whenever material to be seized falls "arguably within First Amendment protection, and the taking [brings] . . . to an abrupt halt an orderly and presumptively legitimate distribution or exhibition", *Roaden* v. *Kentucky*, 413 U.S. 496, 504 (1973), the First Amendment to the U. S. Constitution "calls for a higher hurdle in the evaluation of reasonableness" of the search. Further, a massive seizure having an effect of a prior restraint is not permissible unless there has been a prior adversary hearing. *A Quantity of Books* v. *Kansas*, 378 U.S. 205, 210 (1964).

Respondent concedes in the reply to the petition for certiorari that, whenever the Town Justice believed there was probable cause that an item was obscene, "each and every copy" of the item in the store was seized (Pet. in Opp. p. 5). (In all, over 860 copies of approximately 650 items were seized.)

What this Court stated in *Marcus* v. *Search Warrant*, 367 U.S. 717, 736 (1961), is equally apt here:

> ". . . there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing . . . , because all copies on which the police could lay their hands were physically removed . . . ."

Even if seizures are for the legitimate purpose of preserving the evidence (*Heller* v. *New York*, 413 U.S. 483, 490 [1973]), that legitimate purpose does not justify a

seizure of *all* copies of every item as to which probable cause may be deemed present. Such a seizure of substantially all petitioner's inventory is patently unconstitutional under the prior precedents of this Court.

There is another related constitutional defect present in this massive seizure. This Court has consistently held that an independent magistrate must "focus searchingly on the question of obscenity" before granting or denying a search warrant. *Marcus* v. *Search Warrant,* 367 U.S. 717, 732 (1961). In this case the Town Justice reviewed over 650 different books, periodicals and movies in approximately six hours. He devoted approximately 2-10 seconds to each book or periodical (looking at two, three or perhaps six pages), looked at a few minutes of each film that was on exhibition, and looked only at the picture on the outside of each box of film (Transcript pp. 97-99).[1] While we do not suggest this Court should impose a per item time limit or test, the cursory review implicit in a perusal of a few seconds cannot constitute the "searching focus" required by the decisions of this Court. Again, as was said in *Marcus* v. *Search Warrant, supra,* at 732:

> "It is plain that in many instances, if not in all, each officer actually made ad hoc decisions on the spot and, gauged by the number of publications seized and the time spent in executing the warrants, each decision was made with little opportunity for reflection and deliberation."

One of the dangers of massive seizures, where the massiveness relates to the number of titles seized, is that there is a significant possibility of First Amendment protected

[1] The implications of these facts on the requirement that the items be considered "as a whole" are discussed in Point II, *infra.*

material being included with that which is not protected. Human nature makes it more difficult to focus searchingly on 600 items than on six. This being the case, it is particularly important that in those instances in which large numbers of books or other printed works are included, the requirements imposed by this Court in prior decisions be scrupulously followed.

POINT II

A search warrant for allegedly obscene material should not be issued unless there is a sufficient factual basis of obscenity based on a review of the material as a whole.

The Town Justice reviewed over 650 books, periodicals and movies in approximately six hours. He found probable cause for books and periodicals to be obscene by devoting approximately 2-10 seconds to each book or periodical, looking only at two, three or perhaps six pages and looking only at the illustrations and captions (Transcript pp. 98, 99). He found probable cause for each motion picture to be obscene merely by viewing a photo from a single frame taken from the film, which photo appeared on the box containing the film, with respect to films in boxes, and by viewing a few minutes of each film that was on exhibition (Transcript pp. 97, 98). Based on these cursory and incomplete reviews, over 860 items (some duplicative) were seized.

Under *Miller* v. *California,* 413 U.S. 15, 24 (1973), the governing test for obscenity consists of three elements: (a) whether the average person applying contemporary community standards, would find that the work, *taken as a whole,* appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sex-

ual conduct specifically defined by the applicable law; and (c) whether the work, *taken as a whole,* lacks serious literary, artistic, political, or scientific value. The requirement of a "searching focus" for seizure warrants for books, periodicals and films means that the independent magistrate must have probable cause to believe that all three parts of the *Miller* test will be satisfied by the material to be seized. See *U.S.* v. *Tupler,* 564 F.2d 1294 (5th Cir. 1977). As was noted in *Tupler,* while it might be possible "in a rare case" that appeal to prurient interest could be established without considering the offending material taken as a whole, it is not possible to establish probable cause to believe that an item, "taken as a whole," lacks serious literary, artistic, political or scientific value unless the material is reviewed as a whole or at least substantially as a whole.

The requirement that material be considered as a whole is vital to drawing the line between First Amendment protected material and obscenity which is not so protected. The decision of this Court in *Roth* v. *United States,* 354 U.S. 476 (1957) laid to rest the standard of *Regina* v. *Hicklin* [1868] L.R. 3 W.B.360 that allowed material to be judged by the effect of isolated excerpts. Under that standard, works which are now considered great works of literature had been excluded. Since *Roth,* this Court has time and again held that in determining whether material is protected by the First Amendment, it cannot be judged merely by effect of an isolated excerpt but must be judged as a whole. In this case, the magistrate looked only at the illustrations and captions in the books and periodicals. This Court has consistently held, however, that pictures must be reviewed "in the context in which they appeared" as part of the whole work. *Kois* v. *Wisconsin,* 408 U.S. 229, 231 (1972).

This concept is important not only when applied to complete works such as films or novels, but also when applied to works that constitute compilations, whether they be newspapers, periodicals or anthologies. It should be noted that periodicals are involved in this case and that the Town Justice apparently merely flipped through the periodicals and books to make a decision. (Further, as noted in Point I, *supra,* the average time spent in reviewing each item of printed material was less than ten seconds.) This Court has held, however, in *Kois* v. *Wisconsin, supra,* that a portion of a compilative work (in that case, an underground newspaper) may be considered separately only if the non-obscene portions have been injected into the work for purposes of avoiding prosecution[2] or if the portion is in no way rationally related to the whole. In addition to *Kois* v. *Wisconsin,* this Court has applied the requirement that a work be judged as a whole to periodicals in *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478, 489 (1962) and *Ginzburg* v. *United States,* 383 U.S. 463 (1966).[3]

As this Court has recognized in the past, the power to seize is simply a form of prior restraint. Therefore, it is necessary that the requirement of taking the work as a whole be applied as scrupulously in the finding of probable cause as in the ultimate determination of obscenity.

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[2] The example given by this Court was "a quotation from Voltaire in the flyleaf of [an otherwise obscene] . . . book." (408 U.S. at 231)

[3] The concept of compilations and anthologies goes far back in the history of thought and written expression. See 2 Encyclopedia Britannica at 29, "Anthology" (1962). Often such compilations or anthologies contain materials not previously published, as well as reprinting previously published material. See, *e.g., Dissertationes de studiis instituendis* published in Amsterdam in 1645 by Hugo Grotius and the printer Ludwig Elzevier.

CONCLUSION

In view of the foregoing, the *Amici* respectfully urge the Court to reverse the decision below.

Respectfully submitted,

MICHAEL A. BAMBERGER
Attorney for Amici
425 Park Avenue
New York, New York 10022

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HEINE & UNDERBERG
Of Counsel